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In The

Supreme Court of the United States

October Term, 1964

No. 914

MATT M. KOTULA, d/b/a ALBANY MOTOR SALES,
Petitioner,

vs.

FORD MOTOR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WAYNE G. POPHAM
900 Farmers & Mechanics Bank Building
Minneapolis, Minnesota 55402
Attorney for Petitioner

Of Counsel:
ROBERT A. MINISH
900 Farmers & Mechanics Bank Building
Minneapolis, Minnesota 55402

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Matt M. Kotula prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on November 19, 1964.

CITATION OF OPINIONS BELOW

The opinion of the District Court is unreported and is printed in the record filed with this petition at pages 466-74. The opinion of the Circuit Court of Appeals, printed in Appendix "A" hereto, pp. 25-39, is reported at 338 F.2d 732.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on November 19, 1964. Appendix "B," p. 39.

The jurisdiction of this Court is invoked under 28 *U.S.C.* Section 1254(1).

QUESTIONS PRESENTED

1. The Court of Appeals held that the evidence wholly failed to establish any causal connection between respondent's coercive conduct and the termination of petitioner's franchise. This holding raises the following question:

> Whether the Court of Appeals has deprived petitioner of his constitutional right to a jury trial and improperly invaded the function of the jury by reweighing the evidence and setting aside the finding of the jury that the evidence established a causal connection between the coercive conduct of respondent and the termination of petitioner's franchise.

2. The Court of Appeals also held that a dealer could not recover for wrongful termination of his franchise unless the officials who issued the formal order for termination actually engaged in the coercive conduct. This holding raises the following question:

> In a suit under the Automobile Dealer's Franchise Act for wrongful termination of a franchise, where the initiation of termination proceedings by a local officer was the result of the dealer's resistance to coercive conduct by such officer, may the manufacturer avoid liability because the formal order for termination was issued by another officer?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

1. The statute involved is Act, August 8, 1956, 70 Stat. 1125, 15 *U.S.C.* §§ 1221-1222. It is printed in Appendix C, *infra*, pp. 40-42.

2. *United States Constitution*, Amendment 7:

> In suits at common law where the value in controversy shall exceed 20 dollars the right of trial by jury shall be preserved, and no facts tried by jury, shall otherwise be re-examined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

1. Nature of the Action.

Petitioner, the franchised Ford Dealer for Albany, Minnesota, filed a complaint in the above case charging respondent with a violation of the Automobile Dealers' Franchise Act, 70 Stat. 1125, 15 *U.S.C.* §§ 1221-25, and claiming damages for respondent's failure to act in good faith in terminating petitioner's franchise. The case was tried before the court and jury; a verdict was returned for petitioner in the sum of $12,500.00.

Respondent moved for judgment notwithstanding the verdict and in the alternative for a new trial. The district court granted the motion for judgment notwithstanding the verdict and judgment for the respondent was entered on that order. When petitioner requested the court to rule on respondent's motion for a new trial, the court granted that motion. Petitioner appealed to the Court of Appeals for the Eighth Circuit from both orders and the judgment. On November 19, 1964, the Court of Appeals affirmed the order granting judgment for defendant notwithstanding the verdict and the judgment entered thereon, but did not consider the propriety of the alternative motion for a new trial.

2. Summary of Evidence Presented in the District Court.

Petitioner produced evidence in the trial court that his termination resulted from coercive conduct of local Ford officers who were "out to get him" because of his resistance to their coercive conduct. Respondent (hereinafter referred to as Ford) asserted that the termination was not the result of coercion but was simply a business decision, claiming that its records proved petitioner's sales performance was inadequate. Petitioner asserted that his sales performance was above average and produced evidence showing that Ford's records relating to his sales were deliberately falsified to justify his termination. The evidence presented by the parties as to the cause of the termination was thus directly in conflict and impossible to reconcile. The jury decided the cause of the termination in petitioner's favor.

Since the verdict was in petitioner's favor, the evidence will be presented in the light most favorable to the verdict.

Petitioner was an experienced Ford dealer who had operated the franchise in Albany and Avon, Minnesota, since 1947. This is a small farming community with a population of 4,000 persons. In addition to petitioner's Ford dealership, Chevrolet and Plymouth both had dealerships in Albany.

The evidence is undisputed that his dealership facilities were excellent (58-9). The evidence also indicates that petitioner was an industrious, hardworking individual whose dealership was open longer hours than his competitors (100). He was respected in his community and had served as its mayor (127).

The testimony also described his activities to aggressively promote the sale of Ford products in his territory. For example, a comparison of the total lines of newspaper advertising by all the dealers in Albany for the years 1957 through 1961 showed that petitioner ran 2,889 inches, the Plymouth

dealer 2,275 inches and the Chevrolet dealer 1,194 inches (155). Other promotional efforts included operating the only tow truck in town (59), maintaining a freight depot, and operating a Ford vehicle as the school bus for the Albany school district. These and other activities enabled him to make contacts and get acquainted with families in the area. He testified that these efforts resulted in the fact that for the years 1957 to 1961 he sold more cars in the franchise area than either of his competitors. He sold 69 cars (90), the Chevrolet dealer 67 cars (29, 412-16), and the Plymouth dealer 58 cars (33).

During the first twelve years that he operated his dealership he testified that his relations with Ford were normal (63). On two occasions in 1958 Ford expressed its willingness to have petitioner take additional territory (64).

The First Act of Coercion.

Petitioner based his claim, that the termination was caused by coercive conduct of local Ford officers, upon a sequence of events that began with an incident in May, 1959, when these officers attempted to force inventory on him.

At that time, petitioner was told by Mr. Donald Norton, the Ford general field manager for the Twin City District, that he had to buy a two-ton truck (65, 66). Petitioner tried to explain to Mr. Norton that he could not justify the purchase of such a truck because there was no market for that large a truck in his area, and because he already had two trucks in stock (65). Petitioner's position with respect to his need for this truck was subsequently substantiated by one of Ford's officers in Detroit, a Mr. Sieferth, who told petitioner that, for his size town, a half-ton truck would be a sufficient truck inventory (72).

Mr. Norton, however, refused to accept petitioner's explanation. He became angry and threatened to withhold deliv-

ery of cars to petitioner and to terminate his franchise unless he agreed to purchase the truck. Mr. Norton said:

> Look, you either take that truck or you're not getting any more cars and you are not going to be a Ford dealer. * * * If you don't want that truck, you don't want to be a Ford dealer, and if you have made up your mind on this score, then we will close it at that and you are not going to be a Ford dealer. * * * If you don't take that truck, there will be no more cars for you. Don't bother calling up distribution or me. You have made up your mind. If you don't want to take that truck you are not going to get any more cars, and that is that. (66.)

Mr. Norton carried out his threat and withheld the delivery of cars petitioner had on order (70).

Petitioner was under pressure from his customers for delivery of their cars. When he was unable to contact any other local officers to see about getting his cars released (70), he called Ford's general office in Detroit on May 18, and related the situation to Mr. Sieferth, who agreed that the purchase of the truck was not required, promised to look into the matter personally, and said that he would either call petitioner or have the Twin City office call him (72).

Petitioner's resistance to Mr. Norton's threats to make him take the truck, coupled with his phone call to Mr. Sieferth, made the Twin City District resolve "to get" petitioner (79). The next morning, on May 19, petitioner received a telephone call from Mr. Ewers, the District Manager of the Twin City District (73), who asked petitioner to come in to see him at once. When petitioner said business prevented this, Mr. Ewers said, "Well, as long as you have taken time out to call Detroit, what I have to tell you, I will come down to see you" (73).

The next day Mr. Norton and Mr. Ewers went to Albany and asked for petitioner's resignation (75), threatening him with termination if he refused (73-75). Petitioner did not

resign, and they continued to withhold delivery of his cars until he gave in, and purchased the truck on May 21, 1959 (80). He was forced to take a loss on this truck in order to sell it (84).

During the trial, Ford personnel admitted that the Twin City District made the decision to terminate petitioner's franchise by June 5, 1959, at most a few days after this truck incident (185). This was a final decision to terminate the franchise, as evidenced by the admission that Ford immediately began to look for a new dealer to take over the franchise when the termination "becomes effective" (185). The Twin City District then began to make the record required to support termination of the franchise.

Subsequent Coercion.

The evidence indicates that during this period Ford's resolve "to get" petitioner continued unabated. For example, in February, 1960, the general field manager again tried to force a truck upon petitioner (84). When petitioner explained that such a truck was sold to the buyer's specifications and not purchased out of stock, Mr. Norton said:

> Look, Kotula, if it's the last thing I ever do, it will be to make you wish you were never a Ford dealer in your life * * * don't ever forget it, Mr. Kotula, that I will get you yet. (85.)

From the time of the first "truck incident" in May, 1959, until the termination, there was no let-up in the malice shown Mr. Kotula by Ford officials. Petitioner was repeatedly threatened with termination unless he would voluntarily resign. In March, 1961, Mr. Norton demanded petitioner's resignation and said:

> Don't you realize that everybody in the Twin City Branch hates your guts? Why don't you resign? Don't you have any self-pride in you at all? You want to stay and do business with people that hate you? Why don't

you go into some other line of cars and get out from under my skin? * * * You are going to be terminated. I am going to get rid of you * * *. Just don't forget, Matt, * * * I am going to get you. (27.)

The Termination Proceedings.

Ford has a formal procedure for termination of a franchise that first requires contacts by the local personnel to attempt to rehabilitate the dealer. Petitioner was not informed that formal termination proceedings had been commenced until the summer of 1961, when he was told his file was being forwarded for termination (89).

According to reports in this file, the required regular contacts with petitioner had been occurring regularly since the commencement of the termination proceedings in May, 1959 (372). However, other documentary evidence revealed that these reports were fabricated to make the file appear to be in order (392-93).

One example is the purported business record of a meeting on April 29, 1959, between petitioner and the local field manager. On cross examination it developed that this report was prepared on a form that was not in existence on that date, but was printed in March, 1960 (323). In addition, the purported author of this report, Fred Aulwes, denied signing it (341).

Another example of a fabricated document in the termination file was the report of a meeting of the district staff to review petitioner's performance before recommending termination. A report in the termination file refers to such a meeting having taken place (357-58), but Mr. Norton admitted that no such meeting occurred (357). A third example is the record of a meeting supposedly held between Mr. Norton and petitioner on September 13, 1959. The date of this meeting inserted in the record, September 13, 1959, was shown

to be a Sunday (364), a day when petitioner's place of business was not even open (365).

The notice of termination sent to petitioner on November 10, 1961, stated, as the reason for termination, that his sales performance was inadequate. Petitioner denied that this was the reason for his termination because the Twin City District had used false sales quotas to distort his sales performance.

The false sales quotas arose because of the nature of the automobile registration system. Respondent's evaluation of a dealer's sales performance is based only on sales within the franchise area (165). A dealer's sales are measured in terms of a quota or objective or market potential assigned to him. This quota is mathematically computed from Ford's desired total sales, broken down to specific quotas for each dealer. These quotas are all computed by reference to Chevrolet registrations (219-220).

All of respondent's sales objectives are based upon this registration information for Ford and Chevrolet vehicles sold in a given franchise area (219). Therefore, if the registrations are inaccurate in a particular franchise area, the entire quota and sales evaluation system is distorted accordingly (228). One consequence of this use of registrations is that dealers will sometimes falsify the registrations to apparently improve their sales performance.

The Chevrolet dealer in petitioner's franchise area was improperly registering sales made outside his area. For example, between 1959 and 1961, his registrations were overstated by at least 41 such improper registrations (412-16). Although petitioner had informed the Twin City District of these incorrect registrations (74, 89), they used these registrations to set false sales quotas for petitioner.

The extent to which the Ford officers falsified petitioner's sales quotas is illustrated by the documents they inserted in

the termination file. As an example, they showed the percentage of Ford-to-Chevrolet car registrations in 1961 as 48.0%, when in fact it was 92.3% and exceeded the zone, district and national averages for that year. Similar discrepancies existed for the other years.

Petitioner accused the Ford officers of using the incorrect Chevrolet registrations to distort his sales quotas (74, 89, 92, 95, 396). However, no record of these complaints was inserted in the termination file which, unknown to petitioner, was being prepared by these Ford officers.

Under Ford procedures, after petitioner received the notice of termination, he requested review by a dealer policy board consisting of four persons and headed by Mr. Benson Ford, Vice President of Ford. Petitioner explained to them that the false sales quotas were distorting the record of his sales performance and requested an independent investigation. This board did not make an independent investigation of the facts, but referred the matter to the Twin City District. The dealer policy board accepted the statements of the Twin City District, and terminated the franchise effective May 28, 1962 (55-56).

REASONS FOR GRANTING THE WRIT

The action of the Court of Appeals is inconsistent with protections clearly recognized in previous decisions of this Court for the important constitutional right to a jury trial. Furthermore, the decision of the Court of Appeals has decided important questions relating to the construction of this Act that have not been but should be settled by this Court. The significance of this case exists because of the magnitude of the automobile industry, which is one of the largest industries in the United States. NOTE, 70 HARV. L. REV. 1239 (1957). The Automobile Dealers Franchise Act, the basic

statute governing the distribution system in this industry, was passed to give relief to some 40,000 individual automobile dealers whose size makes it impossible for them to bargain effectively with the manufacturers. H.R. REP. No. 2850, 84th Cong., 2d Sess.

Collectively the automobile-dealer group is of great importance to the economy. Franchised automobile dealers have a total investment in their businesses in the amount of more than $5 billion and employ approximately 668,000 persons. *Ibid.* The construction of this Act, therefore, has a direct impact on the day-to-day relations between these thousands of dealers and the automobile manufacturers.

1. Petitioner Has Been Denied His Constitutional Right to a Jury Trial.

Coercion Results from the Nature of the Industry.

The present case is an outgrowth of Ford's competition with General Motors Corporation for sales leadership in the automobile industry. As noted by one commentator:

> Since 1953, Ford Motor Company and General Motors Corporation have been competing aggressively for the leadership in automobile sales. This competition has resulted in overproduction and in great pressures on the dealers to dispose of more cars than their territories can absorb. NOTE, 70 HARV. L. REV. 1239, 1243 (1957).

This competition between Ford and General Motors has intensified the inherent economic conflict of interest between the manufacturer and the dealer.

> Manufacturers have high fixed costs and charge dealers standard prices for cars; thus the more cars that are sold to which fixed costs can be allocated, the higher the profit per car. The dealer, on the other hand, may reach a point at which the advertising and sales expenses necessary to sell additional cars will be so increased, and

> the price at which he can sell these cars will be so decreased, that he will sustain a loss or any subsequent sales. *Id.* at 1242.

This inherent conflict, when intensified by high production, produces the coercive practices that the Automobile Dealer Franchise Act was intended to prevent. It is noteworthy that:

> Practically all of the complaints which were received during the congressional hearings concerned pressure by the manufacturer to force the dealer to adopt practices which were economically advantageous only to the manufacturer. Invariably there was a threat to terminate unless the dealer agreed to buy more cars, contribute advertising expenses, pay inflated "phantom" freight charges, or make other concessions for the benefit of the manufacturer. *Id.* at 1249, n. 75.

A dealer who submits to the coercion will not be subjected to termination. Only when he resists such coercion will he be subjected to the exercise of the manufacturer's economic power. It is generally recognized that termination is the result of the manufacturer's reaction to the dealer's resistance.

> It would seem, therefore, that most inequitable terminations will result from the dealer's refusal to submit to the manufacturer's coercive practices and thus will be actionable under the statute. * * * *Id.* at 1249.

The acts of coercion will be committed by some local officer of the manufacturer who is in contact with the dealer. This coercion will generally involve the taking of more vehicles, because the sale of vehicles is the ultimate purpose of the manufacturer, although the coercion might also involve the unnecessary hiring of employees or the acquiring of facilities which would cause loss to the dealer. In this case the form of coercion faced by petitioner, the forcing of inventory on the dealer, is the most prevalent abuse of the manufacturer's power. See *Hearings Before the Antitrust Subcommittee No.*

5 of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. 26 at 486-502.

After the coercion has occurred, the dealer may do one of two things. He can acquiesce in the coercion and take the vehicles, as petitioner ultimately did after his resistance to the original coercion, or he can resist. Where the dealer yields to the coercion, the agents of the manufacturer will be likely to try to coerce him again when they have overproduction. Such continued coercion would last indefinitely unless it were pressed to the extreme where it could cause financial ruin to the dealer.

The other alternative for the dealer is to resist the coercion. In such a situation the officer threatening the dealer may resent the resistance of the dealer and attempt to carry out his threats to terminate the dealer's franchise. In the present case, this is exactly what happened. The Twin City District officials utilized the registration situation in the dealer's area to establish falsely inflated sales quotas that, on the surface, made the plaintiff appear to have a poor sales record. They then set in motion the proceedings that in the course of time effectuated their threats to take away his franchise.

In enacting the Automobile Dealers Franchise Act, Congress was careful to preserve a wide latitude for the manufacturer's exercise of business judgment. It limited the act to cases where "the manufacturer goes beyond normal sales recommendation or persuasion." H.R. REP. No. 2850, 84th Cong., 2d Sess. (1956).

However, the courts and commentators have recognized that when a dealer is terminated for resisting coercion, he has a cause of action under the act. See *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F.Supp. 378, 383 (D.N.J. 1959), where the Court stated that if the dealer "resisted pressure of any sort by sales and this resulted in

non-renewal of his franchise, he would spell out a good cause of action under the Act." See also Kessler and Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L. J. 1, 106, n. 478 (1959), NOTE, 70 HARV. L. REV. 1239, 1249 (1957); H.R. REP. No. 2850, 84th Cong., 2d Sess. (1956).

The Court Improperly Reweighed the Conflicting Evidence.

In the present case petitioner claimed that his resistance to the forcing of inventory caused his termination. The evidence supporting this claim was presented in the statement of the case. Ford denied that coercion was present and rested its defense of the termination on the contents of a termination file that had been assembled by the Twin City District. This file indicated that in May, 1959, petitioner's sales performance was so unsatisfactory that Ford tried to assist him to improve his sales. However, he did not improve and in fact fell back in his sales performance so they had no choice but to recommend termination.

This direct conflict in the evidence was submitted to the jury with instructions that they had to determine whether the termination was the result of coercion or whether it was a business decision. Ford has not challenged the propriety of these instructions (455). The jury found in petitioner's favor. "We must take it that the verdict was obedient to the trial judge's charge. * * *" *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 505 (1957).

The trial court, in setting aside the verdict, weighed the evidence and concluded that, as a matter of law, the termination was not the result of coercion or intimidation (472). The Court of Appeals did not contend that petitioner failed to prove coercion within the meaning of the act, but similarly weighed the evidence and held as a matter of law there was no causal connection between the coercive conduct and the termination. While the Court of Appeals stated, "for com-

pelling reasons we are not persuaded by appellant's argument" (12), it did not identify these compelling reasons. The Court did not discuss the evidence to indicate how the evidence favorable to petitioner was insufficient to support the jury verdict; its opinion recites the evidence representing Ford's version of the termination, all of which was rejected by the jury.

Undoubtedly, all of the evidence does not show that the coercive conduct caused the termination, and different inferences might reasonably be drawn from it. However, it is the jury that "'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'" *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 701, 81 Ed.2d 777, 785 (1962).

The fundamental error of the Court of Appeals is that it accepted Ford's version of the cause of termination despite the finding of the jury. One consequence of this is that it regarded petitioner's sales as inadequate. The Court states:

> Moreover, the facts are that from and including the year 1957, plaintiff failed to fufill his contractual [sales] obligations. * * * Here it should be noted that no claim has ever been made by plaintiff that the criteria established therein were unreasonable, unfair, oppressive or arbitrary (32).

To the contrary, petitioner proved that all his sales quotas set by the Twin City District were false and unfair because they were knowingly based upon incorrect Chevrolet registrations. At trial, petitioner subpoenaed the Chevrolet dealer and his sales records to prove that these registrations were in error by as much as 108% in one year (404-420ff). Thus, Ford's claim that petitioner did not meet his sales quotas is like setting a dealer's quota at 100 cars, when it should be 10 cars on correct registrations, and then saying that because the dealer only sold 15 cars he failed to meet his quota.

And if in such a hypothetical situation the dealer admitted that he did not sell 100 cars, would this be an admission that he did not sell his quota? In the example the dealer actually should have been given credit for selling five cars over his correct quota.

On the basis of the correct registrations which the jury was obligated to consider, the evidence showed that, for example, in 1961 Ford registrations in Albany exceeded the zone, district and national averages. Since petitioner sold 11 of the 12 Fords registered in Albany in 1961 (90), even his own personal sales would exceed the zone, district and national averages for per cent of Chevrolet registration. The 11 cars that petitioner had sold in 1961 were 84.6% of the 13 Chevrolet registrations that year—a better percentage than Ford could do in the zone (82.6%), the district (79.8%), or nationally (84.2%). The record shows that during the years in question petitioner was not outsold by either the Chevrolet or the Plymouth dealers on cars and was barely outsold by Chevrolet on trucks. In all three years Ford was outsold nationally by Chevrolet on trucks and outsold in two of the three years on cars.

Typical of the Court's improper weighing of the evidence relating to sales performance is its use of Ford's chart (32-33) to illustrate what the opinion calls "one facet of plaintiff's submarginal performance." This chart compares petitioner's sales in his area with total Fords registered in his area. It does not attempt to compare his sales performance in this respect with that of any other dealer and it cannot indicate that his sales are either adequate or inadequate. This chart describes only one aspect of petitioner's sales performance in the abstract, and unless a comparison with other dealers is made, it is impossible to determine from this chart whether petitioner's sales performance was superior or submarginal.

The Court's footnote to this chart (33) indicates that the Court searched the record for conflicting circumstantial evidence in order to take the case from the jury. The footnote refers to "the documentary evidence" relating to petitioner's sales performance, and quotes certain sales figures. However, to rely on these quoted sales figures of the Twin City District, the Court overlooked the undisputed evidence that these sales figures were the falsely inflated sales quotas that were based upon the exaggerated Chevrolet registrations. The jury rejected this documentary evidence of Ford, and in relying on this evidence the Court failed to view the evidence in the light most favorable to petitioner.

The Court erred in stating that petitioner did not claim damages for any loss resulting from the purchase of the truck. On the contrary, he claimed damages for the loss of his entire franchise and claimed that this truck incident was the event that caused his termination.

The Circuit Court also accepted as true the assertion that petitioner's sales performance "did not meet the approval of Ford" (33). The Court erred in this respect because it assumed the genuiness of critical reports inserted in the termination file and overlooked the fact that the Ford officers had fabricated various reports in this file. Furthermore, it was admitted that it was a job of the field man to make such critical comments about the activities of most dealers (342), as one means of urging them to make ever greater sales. The Court also accepted the truth of the claim made by Ford officers who inserted in the termination file comments that petitioner was not devoting sufficient time to his business because he operated a school bus. This overlooked the contrary evidence that petitioner's business was open during the time that he operated the school bus, and his testimony that this activity developed contacts and promoted his sales of Ford products.

The Court also refers to petitioner's net earnings as "further evidence that he was a submarginal dealer" (33). The record is devoid of any evidence as to the net earnings that a satisfactory dealer would make in an area like Albany-Avon. Without evidence of such comparative earnings, this evidence shows nothing as to petitioner's sales performance.

Another example of the Court's resolution of conflicting evidence in favor of Ford rather than petitioner is the assertion that Ford personnel tried to work with petitioner (33-34). The jury, however, could reasonably infer that the attitude of Ford personnel toward petitioner was accurately summarized in the statement of Mr. Norton, "Don't you realize that everybody in the Twin City Branch hates your guts" (87).

Similarly, the Court's discussion of the contents of the termination file indicates that it assumed the truth of all the contents of this file (34). The Court overlooks the evidence of fabricated documents which warranted the jury in finding that the file was fabricated to effectuate the threat "to get" petitioner for his resistance to coercion.

Finally, the Court weighed the evidence with respect to the actions of the dealer policy board and concluded that it had "conducted an extensive and independent investigation" (37). The Court cited no evidence to support this conclusion. Petitioner proved, however, that this investigation was neither exhaustive nor independent. At the trial, the executive secretary of the board admitted that the investigation was not independent but was conducted by the very local officials whom petitioner charged with setting false sales quotas in an attempt "to get" him.

> Q. And you did not make such an investigation, did you?
>
> A. • • • it didn't seem to me that he had the problems quite to the extent that merited or would necessi-

tate our coming out there to enable us to conclude the matter.

Q. What is your answer, no?

A. No. (388.)

Petitioner requested the dealer policy board to send someone to Albany to make an independent investigation (92), to expose the extent to which the Twin City District had falsified his quotas. They knew he claimed the quotas were inflated because of the incorrect registrations. He had even cited some examples of incorrect registrations. Despite the seriousness of these charges the dealer policy board denied his request for an independent investigation and merely had the Twin City District make a "check" (388). When the Twin City District said that many of his claims should be disregarded (377), the dealer policy board agreed that petitioner's franchise should be terminated.

Further evidence of the impropriety of Ford's actions is that while it was supposedly giving him an independent review, it had made arrangements to give his franchise to the Plymouth dealer at Albany as soon as the termination became effective (183-85, 326). This indicates that Ford knew that the outcome of the review would not affect the decision to terminate.

The jury could find from this evidence that approval of the termination by the higher Ford officials, without the requested independent investigation, did nothing to interrupt the direct chain of causation that commenced with the forcing of inventory.

The Court's opinion reflects that it reweighed the conflicting evidence and substituted Ford's version of the cause of termination for the jury verdict. This action of the Court of Appeals is in direct conflict with decisions of this Court holding that such procedure is a denial of petitioner's constitutional right to a jury trial. *Gallick v. Baltimore & Ohio*

R.R., 372 U.S. 108 (1963); *Continental Ore Co. v. Union Carbide & Carbon*, 370 U.S. 690 (1962); *Rogers v. Missouri Pacific R.R., supra; Tennant v. Peoria & P. U. Ry.*, 321 U.S. 29 (1944). The standard for determining when the setting aside of a jury verdict constitutes the denial of the right to a jury trial was stated in *Tennant v. Peoria P. U. Ry.*:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. * * * It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation, or any other factual matters, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. 321 U.S. at 35.

The denial of petitioner's right to a jury trial requires the Court to exercise review by certiorari. As stated in *Beacon Theatres v. Westover*, 359 U.S. 500, 501 (1959), quoting from *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935):

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

The fact that since the passage of the Act, no dealer has ever recovered on the merits in any reported decision underscores the need for review of this case. The situation is similar to that which required this Court to exercise "stewardship" over cases arising under the Federal Employers'

Liability Act. See *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 193 L.ed. 497 (1949). Prior to the passage of the Automobile Dealers Franchise Act, manufacturers could unreasonably or arbitrarily terminate franchise agreements without incurring civil liability, and thus had dealers completely under their control. The purpose of this Act was to change the strict rule of nonliability of manufacturers to remedy the manifest inability of dealers to bargain with the manufacturers.

The case at bar involves the classic example of coercion by forcing of inventory, followed in turn by resistance on the part of the dealer, threats of termination if the dealer did not acquiese in the manufacturer's demands, and ultimately, termination of the dealer's franchise. This chain of events, made possible by the disparity in manufacturer dealer bargaining power, prompted the enactment of the Automobile Dealers Franchise Act. If, as the Court held, the evidence in this case does not establish a cause of action under the act, the Congressional intent "to balance the power now heavily weighted in favor of automobile manufacturers" will be largely nullified.

2. This Decision Grants Manufacturers Immunity from the Application of the Act When Their Local Officers Engage in Coercive Conduct.

The Circuit Court also held that even if petitioner proved that respondent's local officials engaged in coercive conduct, he could not recover unless "the evidence was also adequate to warrant a finding that the dealer policy board was a party to the wrongful scheme, and that it too acted in bad faith in its review, investigation and determination" (38). This construction of section 2 of the Act, if correct, will have the effect of excepting virtually all coercion from the Act's coverage.

Since the manufacturer's only direct contact with a dealer is through its local officers and other field personnel, these are the individuals who will commit any acts of coercion or intimidation. The higher levels of management are unlikely to have personal contact with the dealer. When a dealer resists coercion, it is the local officers who will initiate termination proceedings. However, if, as in the present case, the formal order for termination comes from Detroit, the person who issues that order will not have engaged in the coercive conduct. Thus, in the typical case, one officer of the manufacturer commits the coercive acts and initiates termination proceedings, but another officer formally terminates the franchise. Under the construction adopted by the Circuit Court, the fact that the terminating officers, the dealer policy board, were not parties to the coercive conduct bars recovery by the dealer.

The Act contains nothing to suggest that the creation of a dealer policy board itself should bar a dealer's right to recover. The Act was designed to ensure that a remedy exists for all coercive conduct that causes injury to a dealer. Therefore, where a dealer policy board or other analogous body exists and a coercing officer has initiated termination proceedings, the dealer is still entitled to recover if the coercion causes his termination. Unless the dealer policy board makes an independent investigation and review of the dealer's performance, the coercive conduct will continue to be the cause of the termination. Whether the acts of the dealer policy board prevented the coercion from causing the termination depends upon the nature of its investigation and review and in each case, this must be a question for the jury.

Under this holding, manufacturers will be able to insulate themselves from the effect of the Act by placing the power to terminate in the hands of high officials who are not directly engaged in promoting the sale of cars to dealers. Such offi-

cials will never have occasion to threaten a dealer, encounter his resistance, and thereby be involved in a "wrongful scheme to get" the dealer. Therefore, the Act must be construed to hold the manufacturer responsible for the actions of its officials when the lack of an independent investigation by the dealer policy board permits coercion to result in the dealer's termination.

PRAYER FOR RELIEF

Your petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit; and that, upon such review, the judgment of the Court of Appeals be reversed with directions that the jury verdict be reinstated.

Respectfully submitted,

WAYNE G. POPHAM
900 Farmers & Mechanics Bank Building
Minneapolis, Minnesota 55402
Attorney for Petitioner

Of Counsel:
ROBERT A. MINISH
900 Farmers & Mechanics Bank Building
Minneapolis, Minnesota 55402

February 17, 1965

APPENDIX "A"

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,684

Matt M. Kotula, d/b/a Albany Motor Sales, Appellant, v. Ford Motor Company, a Delaware Corporation, Appellee.	Appeal from the United States District Court for the District of Minnesota.

[November 19, 1964.]

Before MATTHES, BLACKMUN and RIDGE, Circuit Judges.

MATTHES, Circuit Judge.

Matt M. Kotula, d/b/a Albany Motor Sales, instituted this action against Ford Motor Company, under 15 U.S.C.A. §§1221-1225, known as the Automobile Dealers' Franchise Act, and sometimes as Automobile Dealers' Day in Court Act, seeking damages for claimed wrongful termination of his franchise agreement with defendant Ford Motor Company. Plaintiff obtained a favorable jury verdict, but the Court entered an order granting defendant's motion for judgment under Rule 50(b), Fed. R. Civ. P., and granting defendant's alternative motion for new trial under Rule 59

(c)(1), Fed. R. Civ. P.[1] From the judgment entered thereon, plaintiff has appealed. His basic contention is that the evidence supports the "finding that the defendant committed acts of coercion and intimidation."

We shall refer to the parties as they were designated in the trial court, except at times defendant will be referred to as Ford.

In brief, plaintiff predicated his cause of action on the theory that defendant failed to act in "good faith" in terminating and cancelling the franchise, and that such termination resulted from coercive conduct on the part of representatives of defendant. The evidence relied upon to establish coercion and intimidation will be detailed during the course of the opinion. The defense was that the termination did not result from failure to act in good faith. The trial court, Judge Nordbye, so found in granting judgment n.o.v. and concluded "[that] as a matter of law * * * the termination proceedings were in no way connected with any alleged coercive tactics on the part of defendant, and were in no way tinged with any elements of coercion, duress or intimidation."

Before proceeding to a review of the pertinent facts it is desirable to direct attention to the provisions of the Act and to the interpretation thereof by the Courts.

The Act, adopted in 1956, was designed to supplement the anti-trust laws of the United States "in order to balance the power now heavily weighted in favor of automobile manufac-

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[1] In sustaining defendant's motion for new trial, the Court stated: "It follows . . . that if the Court's order granting defendant judgment notwithstanding the verdict is reversed or vacated, then defendant's alternative motion for new trial is granted." This order was premised on lack of the evidence to establish that termination of the franchise agreement resulted from coercion or intimidation and because "plaintiff has failed to establish by the greater weight of the evidence that defendant was not authorized to terminate the contract under Paragraph 17(a)(1) thereof."

turers." See preamble to House Report 2850, U.S. Code Cong. and Adm. News, 84th Congress, Vol. 3, p. 4596. Under 15 U.S.C.A. §1222, an automobile dealer may bring suit in the appropriate district court of the United States without respect to the amount in controversy for the purpose of recovering damages "by reason of the failure of * * * [the] automobile manufacturer * * * to act in *good faith* in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling or not renewing the franchise with said dealer; * * *." (Emphasis supplied.)

The term "good faith" shall mean the duty of each party to any franchise, their officers, employees, or agents, "to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation or threats of coercion or intimidation from the other party: *Provided*, that recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." 15 U.S.C.A. §1221. In *Milos v. Ford Motor Company*, 317 F.2d 712, 715 (3 Cir. 1963) and in *Globe Motors, Inc. v. Studebaker-Packard Corporation*, 328 F.2d 645, 646 (3 Cir. 1964), this pronouncement appears: "The critical term is 'good faith' which is defined as 'the duty of each party * * * to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation or threats of coercion or intimidation.'" In the *Globe Motors* case, the Court further stated at page 646, "The statute did not provide a new remedy for breach of contract but created a new cause of action. An indispensable element of the statutory cause of action is not the lack of good faith in the ordinary sense but a lack of good faith in which 'coercion, intimidation or threats' thereof are at least implicit." The legislative history and other cases use slightly different language, but with the same meaning, stating that "good faith" must be determined in the "context" of

coercion or intimidation or threats thereof. See House Report 2850, U.S. Code Cong. & Adm. News, Vol. 3, page 4603; *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F.Supp. 378 (D.N.J. 1959); *Woodard v. General Motors Corp.*, 298 F.2d 121, 127, 128 (5 Cir. 1962), cert. denied, 369 U.S. 887 (1962), reh. denied, 370 U.S. 965 (1962); *Garvin v. American Motors Sales Corp.*, 318 F.2d 518, 519 (3 Cir. 1963); *Pierce Ford Sales, Inc. v. Ford Motor Company*, 299 F.2d 425, 430 (2 Cir. 1962), cert. denied, 371 U.S. 829 (1962); *Augusta Rambler Sales, Inc. v. American Motors Sales Corp.*, 213 F.Supp. 889, 893, 894 (N.D. Ga. 1963); *Blenke Brothers Co. v. Ford Motor Company*, 203 F.Supp. 670, 671 (N.D. Ind. 1962); *Leach v. Ford Motor Company*, 189 F. Supp. 349, 351 (N.D. Cal. 1960); see also Kessler, *Automobile Dealer Franchises; Vertical Integration by Contract*, 66 Yale L.J. 1135, 1177-1180 (1957); Kessler and Stern, *Competition, Contract and Vertical Integration*, 69 Yale L.J. 1, 104-107 (1959); Freed, *A Study of Dealers' Suits Under the Automobile Dealers' Franchise Act*, Univ. of Detroit L.J., Vol. 41, 245; Note, 70 Harv. L.R. 1239, 1246-50 (1959).

We now attend to the facts. The Midwest Region of Ford is headquartered at Chicago, Illinois, and includes the Twin City District. This District with headquarters in Minneapolis, Minnesota, includes the State of Minnesota, and is subdivided into 18 Zones and approximately 325 dealers operate therein. The franchise under consideration is located in Zone "J."

Plaintiff became a Ford dealer in 1947 in an area which is made up of the Towns of Albany and Avon, Minnesota, and surrounding territory, having a population of approximately 4,000 persons. Plaintiff's place of business was located in Albany where there were also Chevrolet and Plymouth dealers. The last franchise agreement between plain-

tiff and defendant being the one pertinent to this action was executed April 1, 1957, and was to continue in force and effect until terminated by either party under the provisions of Paragraph 17. Paragraph 17(a)(1) of the agreement, applicable here, authorized defendant to terminate the agreement for certain causes on notice to plaintiff not less than 90 days prior to effective date of notice; Paragraph 17(a)(6) provided that because the agreement was for an indefinite term it could be terminated by defendant at will at any time on notice to plaintiff not less than 120 days prior to effective date of notice. Under the agreement, plaintiff assumed and agreed to carry out and perform the duties, obligations and responsibilities which were defined in numerous paragraphs including 2(a) relating to sales and providing in pertinent part:

> "The Dealer shall promote vigorously and aggressively the sales of VEHICLES at retail, * * * in the DEALER'S LOCALITY, making use to the greatest reasonable extent of the Company's advertising and sales promotions and merchandising material * * *. Whether or not the Dealer shall have vigorously and aggressively promoted such sales in the DEALER'S LOCALITY and shall have energetically and satisfactorily developed the potentiality for such sales and obtained a reasonable share thereof, shall be determined by reference to such reasonable criteria as the Company may develop from time to time including, without limitation, in the case of VEHICLES (1) the relationship of the Dealer's retail sales of VEHICLES to users located in the DEALER'S LOCALITY to (a) the total registrations of VEHICLES in such locality, (b) the fair and reasonable retail sales objectives of VEHICLES established for the Dealer for such locality, and (c) the registrations of automobiles (or trucks) of other manufacturers selected by the Company and generally competitive with VEHICLES in price and product characteristics * * * and (2) comparison of each of the relationships referred to in the foregoing clause (1) with (a) similar relationships

with respect to each of not less than three (3) other authorized Ford dealers of reasonably comparable size located in the nearest areas of sales and service responsibility reasonably comparable to the DEALER'S LOCALITY, and (b) similar relationships with respect to the average of all authorized Ford dealers as a group in one or more of the following areas: The Company's zone sales area in which the Dealer is located; the Company's district sales area in which the dealer is located; the Company's regional sales area in which the Dealer is located; and the national sales area. * * *"

On or about May 26, 1961, the District Sales Manager informed plaintiff that he was sending plaintiff's file to the Regional Office with the recommendation that his franchise be terminated. The District Office compiled a file which purported to reflect meetings between plaintiff and Ford representatives and the efforts of the representatives to improve plaintiff's performance as a dealer, the negative results obtained, and the reasons for recommending termination. The file was submitted to the designated Ford officials in Chicago and in Detroit, as required by the agreement, and was reviewed by these officials who approved the recommended termination.

By notice dated November 10, 1961, and pursuant to sub-Paragraph 17(a)(1), plaintiff was notified that the agreement was being terminated "because of your failure to perform your duties, obligations and responsibilities thereunder." Thereafter, upon request by plaintiff, defendant's Dealer Policy Board afforded plaintiff a hearing, conducted an exhaustive independent investigation and, after being fully apprised of plaintiff's performance under the agreement, confirmed the recommendation for termination. The termination became effective May 28, 1962. The complaint in this case was filed May 4, 1963.

The foregoing facts, in large measure, stand undisputed. We now give consideration to the evidence upon which plain-

tiff must and does rely as affording proof that defendant failed to act in "good faith" in terminating his franchise. Although this evidence was contradicted, we are required because of the present posture of the case to view the evidence in the light most favorable to plaintiff and we must give to plaintiff the benefit of all inferences which may reasonably be drawn from the evidence.

The trouble began in early May, 1959, when the General Field Manager of Ford notified plaintiff that he had to "take" a two-ton, F-600 truck. Plaintiff remonstrated because of lack of a market for such a truck. The representative persisted in his demand, stating: "you either take that truck or you're not going to be a Ford dealer. If you don't want that truck, you don't want to be a Ford dealer." The upshot of this controversy, according to plaintiff, was his inability to procure delivery of two auto. biles which were then on order; that in an effort to obtain the automobiles plaintiff made a telephone call to the Ford District Office and finally on May 18, 1959, called Ford's general office in Detroit. Two days after the latter call, the District Manager and the General Field Manager called on plaintiff at his place of business. They "appeared to be angry because plaintiff called Detroit." They asked plaintiff to resign and "threatened him with termination if he did not resign." Sometime later, at the insistence of another Ford representative, plaintiff purchased the truck and thereafter received delivery of the two automobiles. Eventually plaintiff sold the truck at a loss of $125.00.

Plaintiff's position is that the foregoing truck incident was permeated with coercion and intimidation and threats thereof; that there emanated from this event a plan and scheme whereby baseless, inadequate and insufficient grounds of inefficiency were compiled against plaintiff; and that such plan was designed to and did in fact cause officials of Ford

to act upon the baseless and insufficient charges which were submitted in support of the recommended termination. Plaintiff further argues that the evidence shows other events occurred which established a pattern of conduct consistent with the supposed scheme to wrongfully terminate his franchise agreement. Thus, we are reminded that in February, 1960, when plaintiff again demurred to a request that he purchase another F-600 truck, the same General Field Representative made this statement to him: "Look, Kotula, if it's the last thing I ever do, it will be to make you wish you were never a Ford dealer in your life. * * * Don't ever forget it, Mr. Kotula, that I will get you yet."

The difficulty with plaintiff's premised theory is that the favorable evidence, when judged by the controlling legal principles, wholly fails to establish any causal connection between the coercive conduct relied upon, and the termination of the agreement. Whether plaintiff had a cause of action under the Act for damages, if any, he sustained from the pressure that was exerted in connection with the 1959 truck incident, need not be decided. The fact is plaintiff did not include as an element of his claimed damages any loss resulting from the purchase of the truck.

Moreover, the facts are that from and including the year 1957, plaintiff failed to fulfill his contractual obligations under Paragraph 2(a), quoted in part, supra. Here, it should be noted that no claim has ever been made by plaintiff that the criteria established therein were unreasonable, unfair, oppressive or arbitrary. Appellant admitted that the sales objectives established under the agreement were not met, and indeed the documentary evidence shows that plaintiff failed to compete satisfactorily in his territory for Ford sales, and failed to provide satisfactory competition against Chevrolet. The following demonstrates one facet of plaintiff's sub-marginal performance:

	1957	1958	1959	1960	1961
Sales made by plaintiff within franchise area	13	10	22	13	11
Total sales of plaintiff	18	15	23	13	15
Fords registered in Albany trade area	33	22	37	17	22

From these figures, the following percentages are obtained:

	1957	1958	1959	1960	1961	Aver.
Total sales of plaintiff (including sales to non-residents) as a percent of Fords registered in the area	55%	68%	62%	76%	68%	65.9%
Percent of Fords registered in the Albany area which were sold by plaintiff	39%	45%	59%	76%	50%	54.8%[2]

Plaintiff's undisputed net earnings, including about $1,000 per year from his bus operations and his salary of $15.00 a month as Mayor, are further evidence that he was a submarginal dealer. In 1959 his net was $5,637.32; in 1960, $3,434.70; in 1961, $4,715.83 and 1962, $3,100.45.

Plaintiff's sales performance did not meet the approval of Ford. Its representatives endeavored on periodical contacts with plaintiff to assist him in his operations and to per-

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[2]The documentary evidence also establishes that plaintiff failed to fulfill his sales objectives as required by defendant in accordance with the franchise agreement. Thus in 1957, plaintiff accomplished 38.3% of his sales objective, whereas the sales of all the dealers in his zone were 99.4% of their total objectives and in the District 100.9%. In 1958, he fulfilled 30.6% of his sales objective compared to the Zone total of 81.6% and the District total of 91.7%. In 1959 he fulfilled 43.4% of his objective compared to a Zone total of 126.2%, and District total of 111.9%. In 1960, he fulfilled 37.1% of his sales objective compared to a Zone total of 128.5%, and District total of 80.8%. In 1961, he fulfilled 41.7% of his sales objective compared to a Zone total of 99.5% and a District total of 90%.

suade him to change his business methods so that his sales record would improve. Admittedly, plaintiff had operated a school bus continuously since 1957, requiring his absence from his business for a period each morning and afternoon. Repeated efforts were made to convince plaintiff of the necessity of devoting all of his time to the operation of his business, but plaintiff refused to discontinue the side activity. He refused to employ a salesman or additional mechanics; he ignored repeated requests to establish a new sales program, in fact this record demonstrates that plaintiff not only did not welcome or countenance any interference by Ford's representatives, but that he conducted the business in accordance with his own judgment. His testimony under cross examination attests to his attitude:

> "Q. I am referring specifically to the over-all contractual obligations, Mr. Kotula, if you didn't agree with the suggestion or recommendation of the Ford representatives, you didn't do it, isn't that right, sir?
>
> A. You would be right in saying that, yes.
>
> * * * * *
>
> Q. You never did do anything you couldn't see your way clear on, isn't that right?
>
> A. That I never did anything I couldn't see my way clear?
>
> Q. Yes, sir.
>
> A. Well, that's right."

The termination file upon which the Ford officials acted is made up of statistics, including "Dealer Contact" reports, revealing every phase of plaintiff's operation. It would unduly burden and lengthen this opinion to enumerate all of the contents of this file. It has been carefully examined and among other matters discloses that between May 14, 1959, and July 6, 1961, both inclusive, plaintiff was contacted by Ford's representatives approximately 25 times. Reports of these contacts show a pattern of suggestions and advice designed to enable plaintiff to improve his performance.

We are mindful of the evidence plaintiff offered tending to establish that "false" registrations of new automobiles were reported by the competing Chevrolet dealer. It appears that this dealer sold vehicles to persons living outside his franchise territory but in reporting the sales to the State of Minnesota, showed that such outside purchasers were residents of the Albany territory. Apparently this procedure improved the Chevrolet dealer's sales performance in the eyes of General Motors Corporation, and brought about an increase in his quota for new automobiles. The R. L. Polk Company, recognized in the industry as the most reliable source of new car registrations, assembles information from the State records and furnishes it to automobile manufacturers who rely thereon in preparing sales quotas for their dealers. Plaintiff endeavored to establish that Ford's comparative measurements, that is, its planning or market potential and its program and leadership objectives as applied to him, were knowingly based upon such invalid or false registrations.

From these circumstances, plaintiff argues that, "While the Twin City District had nothing to do with falsifying the figures, they did use these figures as a convenient basis for terminating the plaintiff's franchise. * * * The jury could well find that if the defendant was acting in good faith it would not have insisted on using these baseless sales measurements but, when called to their attention, they would have promptly defended their dealer and have straightened out his sales comparisons in order to compensate for this improper registration situation."

For compelling reasons we are not persuaded by appellant's argument. As Judge Nordbye expressed it in his memorandum opinion granting judgment n.o.v.:

> "But eliminating sales made by the competing dealers to residents outside the Albany-Avon area who for some reason came into the area to make their car purchases,

> plaintiff's showing as to sales falls substantially below that of his competitors."

Furthermore, plaintiff's alleged failure to meet competition is only one of numerous other reasons assigned by Ford as the bases for termination of the agreement.

The termination file and other evidence establishes that from time to time Ford's representatives did offer recommendations; they did make suggestions; they did urge plaintiff to adopt better business practices; they did insist that plaintiff devote his full time to the business and they did request plaintiff to resign or sell his dealership. But what defendant did in this regard was protected activity absent evidence to warrant the inference that this conduct flowed from and was caused by a concocted plan or scheme to "get" plaintiff. As we have seen, the Act itself provides that "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith," 15 U.S.C.A. §1221(e). And as pertinently stated by the Fifth Circuit in *Woodard v. General Motors Corporation*, supra, 298 F.2d at page 128:

> "As is said in the House Report, the Act 'does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise.' H.R. Rep. No. 2850, 84th Cong. 2d Sess. 9. We do not think that the good faith requirement, whether viewed in or outside of the context of coercion, prevents a manufacturer from terminating a contract with a dealer where dealer has, over a long period of time, violated a valid and material clause of the contract and has failed to comply with the continuing insistence of the manufacturer upon performance. And it is shown, we think, by the quoted portions of the House Report, that there was no legislative intent that the prohibited coercion should include a threat of cancellation if there should be a pro-

longed failure on the part of the dealer to heed the recommendations of yield to the persuasion of the manufacturer that the dealer make a bona fide effort to comply with its undertakings."

One additional and vital phase of the case requires comment. The termination procedures provide that the notice of termination shall advise the dealer of his right to appeal to the Dealer Policy Board. This requirement was met—the notice informed plaintiff of his right to request a conference with the Dealer Policy Board, which was made up of top level officials of Ford. At plaintiff's request, the Board gave him a hearing, and thereafter considered his complaints and objections, including his insistence that the termination was founded upon baseless and groundless charges. The Board also conducted an extensive and independent investigation which among other things developed the true number of vehicles sold by competing dealers to residents of their franchise territories. Based upon this investigation the Board ultimately decided that the franchise should be terminated. It communicated its findings to plaintiff, "outlining just where we had come out on our analysis of the registration information he had given us, and concluded that his performance was so unsatisfactory that the Company's notice of termination was proper and should be confirmed."[3]

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[3]It appears without dispute that terminations for cause rarely occurred. Ford's retail management specialist testified he had been connected with the Twin City Sales Office since 1954 and that this was the only termination that had been processed. A member of the Marketing Staff, Market Representation Department in the Ford Division, stated that:

"We don't like to terminate a dealer. It takes a lot of time. It's not good for us. It hurts us usually in the area and we, of course, would rather not have it happen We would rather be able to rehabilitate an individual and have them [sic] be successful and have them [sic] make money and have him be outstanding in his own area. There is a lot more satisfaction to be able to bring somebody up and help him and improve than there is to disassociate yourself with him."

Thus, even if we assumed, which we do not, that there was sufficient evidence to warrant the finding that the termination file depicted a distorted and groundless record of inefficiency and that the causes alleged were a mere pretext for defendant's arbitrary or capricious action, we would be required to go one step further and hold that the evidence was also adequate to warrant a finding that the Dealer Policy Board was a party to the wrongful scheme, and that it too acted in bad faith in its review, investigation and determination. To so hold would require resort to the rankest kind of speculation and conjecture.

We have reviewed and considered all other events pinpointed by plaintiff and relied upon as constituting further proof that defendant failed to act in good faith from the beginning to the end of the termination procedures. From all of this and for the reasons stated, we are satisfied that the trial court's action in granting judgment for defendant notwithstanding the verdict must be sustained. This makes it unnecessary to consider the propriety of the court's order sustaining defendant's alternative motion for new trial.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX "B"

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,684

September Term, 1964

MATT M. KOTULA, d/b/a ALBANY MOTOR SALES,
Appellant,

vs.

FORD MOTOR COMPANY, a Delaware corporation.

APPEAL FROM the United States District Court for the District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

November 19, 1964.

Order entered in accordance with Opinion.

/s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals
for the Eighth Circuit

APPENDIX "C"

PUBLIC LAW 1026—84th CONGRESS

(Act of August 8, 1956, Chap. 1038, Secs. 1-5, 70 Stat. 1125; 15 U.S. Code, Secs. 1221-1225.)

AN ACT to supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers, by enabling franchise automobile dealers to bring suit in the district courts of the United States to recover damages sustained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers.

* * * * * *

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

* * * * * *

That as used in this Act—

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automobile vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: PROVIDED, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. (August 8, 1956, Chap. 1038, Sec. 1, 70 Stat. 1125; 15 U.S. Code, Sec. 1221.)

Sec. 2 An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after the passage of this Act to act in good faith in performing or complying with any of the terms or provisions of the fran-

chise, or in terminating, canceling, or not renewing the franchise with said dealer: PROVIDED, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. (August 8, 1956, Chap. 1038, Sec. 2, 70 Stat. 1125; 15 U.S. Code, Sec. 1222.)

Sec. 3. Any action brought pursuant to this Act shall be forever barred unless commenced within three years after the cause of action shall have accrued. (August 8, 1956, Chap. 1038, Sec. 3, 70 Stat. 1125; 15 U.S. Code, Sec. 1223.)

Sec. 4. No provision of this Act shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States. (August 8, 1956, Chap. 1038, Sec. 4, 70 Stat. 1125; 15 U.S. Code, Sec. 1224.)

Sec. 5. This Act shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this Act and an express provision of State law which can not be reconciled. (August 8, 1956, Chap. 1038, Sec. 5, 70 Stat. 1126; 15 U.S. Code, Sec. 1225.)